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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1120

FRANCES METZGER WIRTH STEPHAN, Guardian of the Estate of CHARLES WIRTH, *Petitioner,*

v.

THE MARLIN FIREARMS CO., INC., GERHARD HOHN, Administrator of the Estate of F. A. LANDERS, JOHN MISCIUCH and CARL PAVLICK, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March, 1966

INDEX

	Page
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes, Rules, and Constitutional Provisions Involved	2
Statement of the Case	3
1. *Events preceding the shooting*	3
2. *The shooting*	4
3. *The injuries sustained*	5
4. *The lawsuit*	5
5. *Proceedings on voir dire*	7
6. *Post-trial investigation*	11
7. *Decision of the Court of Appeals*	11
Reasons for Granting the Writ	12
1. *Improper curtailment of petitioner's right to exercise peremptory challenges*	13
2. *Improper requirement of demonstration of prejudice in connection with impairment of right to peremptory challenge*	18
3. *Improper refusal to inquire respecting jurors' financial interest in other gun manufacturing companies*	20
Conclusion	22
APPENDIX A	24

Citations:

Aldridge v. *United States*, 283 U.S. 308 (1931)	14
Armborst v. *Cincinnati Traction Co.*, 25 F. 2d 240 (6th Cir. 1928)	14, 16, 20, 21
Bailey v. *United States*, 53 F. 2d 982 (5th Cir. 1931)	14, 20
Beatty v. *United States*, 27 F. 2d 323 (6th Cir. 1928)	14, 16

Page

Browne v. *United States*, 145 Fed. 1 (2d Cir. 1905) 18
Dick v. *New York Life Ins. Co.*, 359 U.S. 437 (1959) 22
Gulf, Colorado & Santa Fe R. Co. v. *Shane*, 157 U.S. 348 (1895) 20
Harrison v. *United States*, 163 U.S. 140 (1896) .. 14, 20
Kiernan v. *Van Schaik*, 347 F. 2d 775 (3rd Cir. 1965) 12, 14, 15, 16, 20, 21
Lewis v. *United States*, 146 U.S. 370 (1892) 14, 20
Northern Pacific R.R. Co. v. *Herbert*, 116 U.S. 642 (1886) 12, 13, 18, 19
People v. *Rigney*, 55 Cal. 2d 236, 359 P. 2d 23 (1961) 16
Photostat Corporation v. *Ball*, 338 F. 2d 783 (10th Cir. 1964) 14, 16, 20
Pointer v. *United States*, 151 U.S. 396 (1894) .. 14
St. Clair v. *United States*, 154 U.S. 134 (1894) .. 14
Swain v. *Alabama*, 380 U.S. 202 (1965) ... 13, 14, 16, 19
United States v. *Annunziato*, 293 F. 2d 373 (2d Cir. 1961) 18
United States v. *Clark*, 1 F. Supp. 747 (D. Minn. 1931), *aff'd*, 289 U.S. 1 15
United States v. *Dennis*, 183 F. 2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 18
United States v. *Napoleone*, 349 F. 2d 350 (3d Cir. 1965) 14

Constitutional Provisions, Statutes, and Rules:

Seventh Amendment to the United States Constitution 2

28 U.S.C.:

Section 1254(1) 2
Section 1870 3
Rule 47(a), Federal Rules of Civil Procedure 2, 15

Miscellaneous:

	Page
Note, Selection of Jurors by Voir Dire Examination and Challenge, 58 Yale L.J. 638	16
The Jury System in the Federal Courts, 26 F.R.D. 409	16
50 C.J.S. 1066 n. 70	14

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on December 20, 1965.

Opinions Below

The United States District Court for the District of Connecticut entered no opinion, its judgment having been based upon a jury verdict. The opinion of the Court of Appeals, which is unreported, is printed in Appendix A hereto.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on December 20, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether in federal court the *voir dire* may properly be limited to questions relevant to challenges for cause, or whether instead the parties are entitled on *voir dire* to ask questions of jurors that are in aid of their right of peremptory challenge.

2. Whether, if a party's right of peremptory challenge in federal court is impaired, there is nonetheless no reversible error in the absence of a demonstration of bias on the part of the jurors.

Statutes, Rules, and Constitutional Provisions Involved

The rule and the statutory and constitutional provisions involved are:

Rule 47(a) of the Federal Rules of Civil Procedure, which provides:

> "The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper."

The Seventh Amendment to the United States Constitution, which provides in pertinent part:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."

Section 1870, Title 28, U.S. Code, which provides:

"In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

"All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court."

Statement of the Case

The questions presented in this case, a diversity personal injury action involving a shooting accident, center upon the actions of the trial judge in dealing with the *voir dire*. The significance of these questions, however, can be measured properly only against the background of the character of the litigation. Accordingly, we first sketch the general contours of the litigation and then set forth in detail the relevant facts respecting the *voir dire*.

1. *Events preceding the shooting.* On September 23, 1961, respondent Pavlick, then 15 years old (A. 85), purchased a rifle at a retail gun shop.[1] The shop was operated by one Landers, now deceased, whose administrator is one of the respondents (A. 101). Pavlick was accompanied by his uncle, respondent Misciuch, who actually purchased the gun with money his nephew supplied him because the latter was too young to buy the rifle himself (A. 85, 111-113).

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[1] References to the extract of the record printed as an appendix for the Court of Appeals are designated as "(A. ——)."

The gun seller, Landers, believed that the boy would be using the gun (A. 105).

The weapon in question, a .22 caliber rifle, was manufactured by respondent Marlin Firearms Company in 1947; but its basic design, including its so-called safety features, had not been changed since 1891 (A. 121, 151-152, 275-277). The rifle had no safety catch or part, as such (A. 155, 160-161). Instead, the exposed hammer had, in addition to a full-cock notch, a half-cock notch; and when the hammer was secured in the latter notch the weapon would not fire (A. 187-188). In order to secure the hammer in that position, however, the user had to employ a two-step procedure involving the interplay of both the hammer and the trigger. This maneuver required the user of the gun first to pull the hammer back; next, while holding the hammer with his thumb, to squeeze the trigger; and finally to guide the hammer to the "half-cock," or safety, position (A. 66-67, 190-191, 281). If the hammer slips from the thumb, the gun fires (A. 73, 191).

Marlin was aware that the rifle, which is employed primarily for shooting small game, was widely used by young persons (A. 155). It advertised the rifle as safe and dependable (A. 134-137).

2. *The shooting.* On November 2, 1961, Pavlick went hunting with petitioner's grandson, Charles Wirth, who at the time was 17 years of age. Pavlick carried the Marlin rifle. The two boys proceeded up a logging trail wide enough for only one person (A. 53-54). Wirth was out in front, with Pavlick walking about ten feet behind (A. 79). The latter was holding his gun straight out in front of him, despite Wirth's warning that he should "cradle" the gun in his arms (A. 53, 80-81). While holding the gun in this manner, Pavlick attempted to go through the two step hammer and trigger maneuver required to put the rifle in safety position. As he did so, his thumb slipped off the

hammer, and, the trigger having been squeezed, the gun discharged (A. 73-74). The bullet thus fired struck Wirth in the back.[2]

3. *The injuries sustained.* As a result of the gunshot wound, young Wirth suffered a complete severance of his spinal cord which made him a permanent paraplegic, with attendant loss of function of his legs and all major organs of the lower portions of his body (A. 256-268).

4. *The lawsuit.* Because of the accident, petitioner, a resident of Florida and guardian of Wirth's estate, instituted an action to recover $750,000 in damages from any or all of four defendants—Marlin, Pavlick, Misciuch and Landers. The complaint alleged negligence on the part of all of them and also claimed breach of warranty against Marlin and Landers. The issue that was determinative of the liability of Marlin and pertinent also to the gun dealer's liability was the design and operation of the gun, especially its alleged safety features. More specifically, the primary question was whether the alleged safety features were of an unreasonably hazardous design, or in any event sufficiently hazardous so that there was a duty on the part of the Marlin Company either to warn users of the gun or to install a new safety mechanism when the gun was returned to it for repairs, as it had been shortly after Pavlick purchased it (A. 105-111).

As to this issue, petitioner introduced at the trial the testimony of a widely experienced gun expert (A. 163-255), who stated that the design of the so-called safety mechanism was "hazardous," that the hazard was "unreasonable in this century" in view of alternative safety mechanisms that were available, that the design was not "reasonably fit for the purpose for which it was intended,"

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[2] At the trial, when Pavlick demonstrated the safety device his thumb slipped off the hammer again (A. 95). Had the gun been loaded, it would have fired.

and that it was not "safe and dependable" (A. 188-213, 248). His testimony was lengthy and exhaustive, embracing a historical discussion of the development of various types of weapons and their safety devices. His conclusion —which was based fundamentally upon the fact that "an attempt to put this gun in a safety position requires manipulation of the same devices which fire the gun" (A. 190)—is fairly represented by the following exchange:

> "Q. What I am asking you is, is the design which resulted in this method of putting this gun into a half-cock safety position——
>
> "A. You mean the design which required a certain procedure?
>
> "Q. Yes. Is that reasonably safe? That is, rather, is that reasonably fit for the purpose for which it was intended?
>
> "A. No.
>
> "Q. Likewise, I ask you the same question: Is it safe and dependable?
>
> "A. You are talking now about the safety of this firearm?
>
> "Q. Yes.
>
> "A. The answer is no" (A. 210).

In rebuttal, the only expert testimony was supplied by an employee of respondent Marlin, whose testimony is fairly characterized by the following exchanges:

> "A. I believe that this method of achieving safety in the safety itself compares favorably with any safety systems on the market.
>
> "Q. Why?
>
> "A. Well, from my use of them, is about the best answer I can give to that.
>
> • • • • • • •

"Q. Well, do you think that for the user of a gun . . . it is just as easy to go through this same half-cocked operation of pulling the trigger, letting it go, releasing the hammer [,] as it is to flick a button or pull a lever? Do you want to tell the . . . jury that?

"A. I find it so" (A. 283, 285).

Despite this testimony, the jury returned a verdict for respondent Marlin; despite the undisputed fact that respondent Pavlick was pointing the gun at petitioner when he attempted to put it on safety, the jury returned a verdict for Pavlick; despite the undisputed testimony that Landers was paid by the 15-year old Pavlick and thought the gun would be used by him, although the law forbids sale to anyone under 18, the jury returned a verdict for Landers; and despite the undisputed testimony that respondent Misciuch served as a "front" for Pavlick in buying the gun because the latter was underage, although Misciuch admitted he regarded a gun with a safety catch as "very safe" whereas he "didn't think" the Marlin was a "safe gun" (A. 115), the jury returned a verdict for Misciuch.

5. *Proceedings on voir dire.* We turn now to the events most immediately related to the issues raised in this petition. Pursuant to the practice in the District Court for Connecticut, the trial judge conducted the *voir dire* examination himself. He began with a general statement of the issues involved, and then identified the attorneys and parties and inquired whether they were known to any of the jurors (R. 3-19).[3] He concluded by asking whether any of the jurors had heard about the case and whether there

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[3] In addition to the Appendix, petitioner has filed the transcript of record of the *voir dire*, which contains certain material not in the Appendix. The transcript is cited as "R.".

were "any other circumstances" that "would bear upon your qualifications to serve as jurors" (A. 5).

The judge then, at a bench conference, talked with the attorneys about further questions, and it was during this conference that the events occurred upon which petitioner relies here. In outline, these were as follows: During the judge's prior questioning of the prospective jurors, one of them had volunteered the information that he had had some twenty years experience with firearms and that he was a part-time inspector of firearms and a dealer and license holder (R. 12-13). This led petitioner's counsel to request the judge to inquire about the other jurors' familiarity with guns, but the judge refused to conduct such an inquiry. As the italicized portions of the discussion quoted below demonstrate, counsel's request that these questions be asked was for the purpose of enabling him to exercise his peremptory challenge; and the judge's refusal, in contrast, was because he did not believe the answers would result in excusing any juror for cause.

The discussion, in more detail, was as follows:

> "[The COURT]: Are there any other questions?
>
> "Mr. KOSKOFF [petitioner's counsel]: I have a few, your Honor. I'd like to know whether any members of the panel own any guns or have any familiarity with firearms or anybody in their family, or whether they do any hunting; that kind of thing.
>
> "The COURT: That's going to take an awful long time and I just wonder how relevant it would be.
>
> "Mr. KOSKOFF: Well you see that fellow who spoke up is an indication of what we would run up against if we didn't ask a quesetion like that. You'd have an expert on the panel before you start.
>
> "The COURT: Well he indicated he's an expert, that's one thing, but I think——

"Mr. MAHER [Pavlick's counsel]: Is you Honor going to excuse him?

"The COURT: I'm going to excuse him. I assume he should be excused.

"Mr. MAHER: I would assume so.

"Mr. KEVIN GORMLEY [Marlin's counsel]: I don't think he ought to be excused.

"Mr. KOSKOFF: I think he ought to be excused.

"Mr. KEVIN GORMLEY: The fact he has some experience with guns doesn't——

"Mr. KOSKOFF: *Well I think we're entitled to know whether they've had experience with guns and take our choice.*

"The COURT: *One thing, there's enough challenges, peremptory challenges so that if they're all exercised I don't think there are going to be very many jurors left.*

"Taking this one thing, though, does anyone oppose the excusing of Mr. Buchalter, Number 7, for cause? He's the one that said he had 20 years' experience in the use of firearms.

"Mr. KEVIN GORMLEY: Yes, your Honor, we would object on behalf of Marlin Firearms on having the fellow excused.

Mr. MARTIN GORMLEY [also counsel for Marlin]: May I interject this. If we're going to excuse everybody whoever went hunting or has any experience with guns we're going to wind up with a jury of 12 women.

"Mr. KOSKOFF: *I didn't say I was going to excuse everybody. I'd like to know what they know.*

"The COURT: For the time being I'm—if I construe that Mr. Koskoff has challenge for cause with respect to Number 7, Mr. Buchalter, I'll deny that with leave to Plaintiff's counsel to renew it before the panel is

finally seated, having in mind the number of peremptory challenges.

[Discussion about the number of peremptory challenges.]

"The COURT: . . . I think we can end up with a jury satisfactory to all concerned, *but I really think this question about are there anybody familiar with the use of firearms is going to lead nowhere. It certainly isn't going to produce challenges for cause as far as I'm concerned.* There are men who have been in the military service here. It is one of those questions that gives rise to idle chatter it seems to me. I will be glad to ask whether anyone has been in the business of repairing firearms or expert of any sort, if you wish, but I think in a country where every citizen has a right to bear arms, it's like asking in a tax case whether everybody has filed their income tax returns or had any trouble with them (A. 5-7, R. 23-27)."

Petitioner's co-counsel then asked whether the court would at least inquire whether any juror belonged to the National Rifle Association, at whose classes Pavlick had received instructions (A. 61-62), or to any gun club, and the judge said he would "do that much" (A. 8).

Next, petitioner's counsel, Mr. Koskoff, requested the court to ask whether any juror "owns any stock in any company that manufactures guns," but the judge refused, observing that he had asked such a question limited to Marlin (A. 8).

The judge then called the panel back, and, in the course of putting certain additional questions to them, stated:

"I'm not going to ask whether any of you have had experience in the use of firearms. I would assume all have had in some capacity or another all being citizens

of the United States who have a right under the Constitution to bear arms, and some others who have had a duty to do so" (A. 9).

Finally, when the judge asked the panel whether any of them knew any of the prospective witnesses, the gun expert said that he had met the petitioner's expert witness and had one of his books on firearms (R. 38). He was thereupon challenged by Marlin's counsel and the court acquiesced, stating: "I think to avoid any hassel I will excuse Mr. Buchalter number 7 because we are apparently going to have enough" (R. 41).

6. *Post-trial investigation.* After the trial, counsel for the petitioner had an investigation made regarding the foreman of the jury. An affidavit of a private investigator submitted to the trial court in support of petitioner's motion for a new trial showed that the foreman of the jury had served as a paratrooper in World War II; that he had been wounded in action; that he had been separated from the service as a Second Lieutenant; that he had remained in the active Army Reserve, attaining the rank of Captain; that he had served two weeks or more on maneuvers during the summers since the war; and that he had considerable familiarity with small arms (A. 326-331).

7. *Decision of the Court of Appeals.* Of the several issues raised by petitioner in the Court of Appeals, only those relating to the *voir dire* as it bears upon right of peremptory challenge are pressed here. As to the question of *voir dire,* the Court of Appeals cast most of its discussion in terms of whether the trial judge had impaired petitioner's right to challenge for cause. As to this, the court said that the judge had not abused his discretion in refusing to ask the jurors about their experience with firearms generally because only a more limited question—*e.g.,* "whether a juror has a fixed opinion which is dis-

positive" or "whether any juror had an opinion on the adequacy of the Marlin safety mechanism"—might have disclosed basis for disqualification (App. p. 26). The court also concluded that the judge's action was proper "in light of the fact that each prospective juror was alerted to indicate whether his own experience would prejudice his verdict when a juror was disqualified because of expertise," despite the fact that the judge had advised the jurors that he would not ask them about their experience with firearms because presumably many had had such experience (*supra*, pp. 10-11). Finally, as to the peremptory challenge issue, the court simply said:

> ". . . There is no evidence in the record that appellant was denied the information necessary to exercise an intelligent use of her peremptory challenges. Compare *Kiernan* v. *Van Schaik*, 347 F. 2d 775 (3rd Cir. 1965). Moreover, as long as an impartial jury is selected, neither party has any complaint, at least in a civil case. *Northern Pacific R.R. Co.* v. *Herbert*, 116 U.S. 642, 646 (1886)" (App. p. 26).

And with respect to the impartiality of the jury, the court held that the post-trial discovery of the foreman's experience with guns was to no avail, because the judge's "charge told the jury very clearly to consider only the evidence," and "[i]n the absence of a contrary showing, it must be assumed that the jury followed the court's instructions" (App. p. 27).

Reasons for Granting the Writ

The manner in which the *voir dire* was curtailed in this case raises three issues that warrant the grant of *certiorari*. The first relates to the scope of inquiry that must be permitted in order to preserve a meaningful right

of peremptory challenge. The trial judge's belief that the only inquiry he need allow was one that might uncover a disqualification for cause is both plainly incorrect and contrary to the rule that prevails in other federal jurisdictions. Second, the Court of Appeals' holding that an improper restriction of the right of peremptory challenge does not result in reversible error unless it is demonstrated that a biased jury was selected rests upon a misreading of this Court's decision in *Northern Pacific R.R. Co.* v. *Herbert*, 116 U.S. 642, and is in conflict with the decisions of four other Courts of Appeal. And, finally, the determination of the trial court that no inquiry need be made into the financial interest of the jurors in gun manufacturing companies other than Marlin conflicts with the rule that prevails in both the Sixth and Third Circuits.

1. *Improper curtailment of petitioner's right to exercise peremptory challenges.* This Court's decisions leave no doubt that the right of peremptory challenge, which is granted in civil cases in federal courts by 28 U.S.C. 1870, is of fundamental importance to our system of jury trial, and also that one of the important functions of *voir dire* is to secure information upon which that right of peremptory challenge may be intelligently exercised. In *Swain* v. *Alabama*, 380 U.S. 202, this Court described the peremptory challenge as "one of the most important of the rights secured to the accused," and pointed to the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." The Court also observed that "[t]he *voir dire* in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories"; that "[i]t is well known that these factors [relating to peremptory challenges] are widely explored during the *voir dire*"; and that "[t]his Court has held that the fairness of trial by jury requires no less." *Id.*, at 218-221. In thus summarizing the law respecting peremptory chal-

lenges and *voir dire*, the Court drew upon *Pointer* v. *United States*, 151 U.S. 396, 408; *Lewis* v. *United States*, 146 U.S. 370; *Harrison* v. *United States*, 163 U.S. 140; and *Aldridge* v. *United States*, 283 U.S. 308. See also *St. Clair* v. *United States*, 154 U.S. 134, 148 ("[A]ny system . . . that prevents or embarrasses the full, unrestricted exercise by the accused of his right of peremptory challenge, must be condemned.").

The decisions of lower federal courts—other than the Court of Appeals for the Second Circuit—and of state courts adhere to the principles set forth in *Swain*. *Bailey* v. *United States*, 53 F. 2d 982 (5th Cir. 1931), where the Court of Appeals reversed a judgment because the trial judge had declined to ask certain questions on *voir dire*, is typical. Although the Court of Appeals in *Bailey* noted that there was no reason to think that the answers to the questions would have disclosed a basis for challenge for cause, it concluded that the questions "might be expected to furnish some information or make impressions which reasonably might influence the accused or their counsel in exercising the right of peremptory challenge." And, the Court held, the right of peremptory challenge "is one of the most important of the rights secured to the accused. It should not be required to be exercised before an opportunity is given for such inspection and examination of prospective jurors as is reasonably necessary to enable the accused to have some information upon which to base an exercise of that right." *Id.*, at 984. For similar decisions, see *Kiernan* v. *Van Schaik*, 347 F. 2d 775 (3d Cir. 1965); *Photostat Corporation* v. *Ball*, 338 F. 2d 783 (10th Cir. 1964); *Armborst* v. *Cincinnati Traction Co.*, 25 F. 2d 240, 241 (6th Cir. 1928); state court decisions in 23 jurisdictions cited in 50 C.J.S. 1066, n. 70; *cf. United States* v. *Napoleone*, 349 F. 2d 350 (3d Cir. 1965); *Beatty* v. *United States*, 27 F. 2d 323, 324

(6th Cir. 1928); *United States* v. *Clark*, 1 F. Supp. 747, 750 (D. Minn. 1931), *aff'd*, 289 U.S. 1.

The decision in the case at bar is squarely at odds with these precedents. In a case where, as to the principal defendant, the Marlin Company, the outcome turned upon expert testimony respecting the rifle's safety mechanism, questions directed to a juror's experience with guns might well have led to a dismissal for cause. But at any rate the relevance of such questions in aid of petitioner's right of peremptory challenge is obvious. Petitioner quite reasonably might have decided to reject a person simply because he had a strong attractions to guns, especially in the climate of recent years that has divided a part of the population into strong pro- and anti-gun forces. Or petitioner might have excused a person who had used a rifle for some years without mishap—especially if it had a safety mechanism like the Marlin's—on the theory that such a person might feel that guns are not very dangerous after all. The list of possibilities is long, but the short of it is, as petitioner's counsel said, "I think we're entitled to know whether they've had experience with guns and take our choice" (A. 6).

In these circumstances, the Court of Appeals' conclusion that "[t]here is no evidence in the record that appellant was denied the information necessary to exercise an intelligent use of her peremptory challenges" reflects a fundamental misconception of the degree of latitude that must be accorded on *voir dire*. While Rule 47(a), Fed. R. Civ. P., does confer upon the trial judge a large measure of discretion in dealing with the *voir dire*, the purpose of that Rule is to prevent extravagantly prolonged examinations and to eliminate efforts by counsel to use the *voir dire* to influence the panel on the merits of the case. See, *e.g.*, *Kiernan* v. *Van Schaik*, *supra*, at 778; The Jury System in

the Federal Courts, 26 F.R.D. 409, 465-468; Note, Selection of Jurors by Voir Dire Examination and Challenge, 58 Yale L. J. 638, 640, 644-645. In this case, however, the curtailment of *voir dire* could not have been justified on any such basis. Rather, the only ground asserted by the trial judge for his ruling was that the inquiry "certainly isn't going to produce challenges for cause" (*supra*, p. 10); and presumably the Court of Appeals agreed with that standard, for otherwise the judgment would have had to be reversed. But such a restriction on *voir dire* is inconsistent with all of the decisions cited above. See particularly *Kiernan* v. *Van Schaik*, 347 F. 2d 775, 778-779 (3d Cir. 1965), where the court, relying upon this Court's opinion in *Swain*, struck down the practice in the Delaware District Court "of a limited *voir dire* examination which denies its use to assist counsel in the exercise of the right of peremptory challenge . . . and drastically curtails it in aid of the right of challenge for cause." See also *Beatty* v. *United States*, 27 F. 2d 323 (6th Cir. 1928), where the court noted that the trial judge had made this same error.[4]

And if the Court of Appeals' reference to the fact that this was a civil case implies the view that in civil, as opposed to criminal, proceedings the *voir dire* may be limited to questions relevant to disqualification for cause, we note that such a view has never been suggested by this Court and is flatly contrary to the rule in at least three other circuits. Thus, in *Kiernan* v. *Van Schaik*, *supra*, and *Armborst* v. *Cincinnati Traction Co.*, *supra*, the Courts of Appeals for the Third and Sixth Circuits reversed civil judgments because of limitations on *voir dire* that had impaired the right of peremptory challenge. And in *Photostat Corporation* v. *Ball*, *supra*, another civil case, the Court of

[4] We have been able to discover only one jurisdiction in which the *voir dire* is restricted to eliciting information relevant to challenges for cause. See *People* v. *Rigney*, 55 Cal. 2d 236, 359 P. 2d 23 (1961).

Appeals for the Tenth Circuit adopted a similar position. There some jurors had not fully answered certain questions put on *voir dire*, but the trial judge found that the jurors had acted in good faith and that there would have been no basis for challenge for cause even had disclosure been made. The Court of Appeals accepted those findings, but reversed the judgment on the ground that the right of peremptory challenge had been undercut. In language identical to that employed in criminal cases, the court stated:

> ". . . No one will gainsay that the denial or substantial impairment of the statutory right of peremptory challenge is prejudicial to the constitutional right to a fair and impartial jury.
>
> "The very purpose of voir dire examination is to develop the whole truth concerning the prospective juror's state of mind, not only to enable the trial judge to determine actual bias, but to enable counsel to exercise his intuitive judgment concerning the prospective jurors' suspected bias or prejudice." 338 F. 2d, at 786.

To be sure, the Court of Appeals in the case at bar did not explicitly adopt the trial judge's rationale. Rather, the court's treatment of the peremptory challenge issue was quite conclusory. However, since the only reason assigned by the trial judge for his restriction of *voir dire* was that the questions proposed were not relevant to challenges for cause, and since there was no other justification for the ruling that could have been advanced, it seems clear that the Court of Appeals, in affirming, has taken a position that is inconsistent both with the principles clearly stated by this Court and with the overwhelming weight of authority in other circuits and in state courts. Moreover, the decision in the case at bar, insofar as it restricts the *voir dire* to questions relevant to challenges for cause, does not stand alone among Second Circuit rulings. Thus,

in *Browne* v. *United States*, 145 Fed. 1, 7 (1905), the court rejected a claim respecting the importance of *voir dire* to peremptory challenges on the ground that "[t]he defendant's right of choice as to whom he shall challenge is sufficiently secured by his being provided in advance of the drawing with a list of the names and residences of the jurymen. . . ." And *cf. United States* v. *Annunziato*, 293 F. 2d 373, 376 (2d Cir. 1961); *United States* v. *Dennis*, 183 F. 2d 201, 226-228 (2d Cir. 1950), *aff'd on other grounds to which certiorari limited*, 341 U.S. 494. Finally, while our primary contention is that the correction of an erroneous position respecting the scope of *voir dire* in a circuit in which there are thousands of jury trials each year deserves the attention of this Court, we suggest also that the character of the interests at stake in this case make it an appropriate vehicle for deciding the issue. It is fair to say that the outcome of this case may well determine whether petitioner may, despite his tragic injury, be able to build for himself a meaningful life. It would be incongruous if that chance were lost simply because the Court of Appeals wrote a conclusory opinion, if the import of the Court of Appeals' decision is clear, as we say it is.

2. *Improper requirement of demonstration of prejudice in connection with impairment of right to peremptory challenge.* As we have noted, the court, in turning aside petitioner's contention respecting peremptory challenges, held: "Moreover, as long as an impartial jury is selected, neither party has any complaint, at least in a civil case. *Northern Pacific R. R. Co.* v. *Herbert*, 116 U.S. 642, 646 (1886)" (App. p. 26). The court thus laid down a far-reaching requirement that will in practical effect abolish review of trial judges' decisions respecting peremptory challenges. Moreover, in basing this requirement upon *Northern Pacific*, the court misread that decision. And,

finally, the requirement is in conflict with the rule stated by this Court and adhered to in other circuits.

The impact of the requirement that prejudice be shown is obvious. Since the office of the peremptory challenge is to permit "rejection for a real or imagined partiality that is less easily designated or demonstrable [than with a challenge for cause]," *Swain* v. *Alabama, supra,* at 220, it would be a rare case indeed in which it could actually be established after the trial that the jury had been biased, even if counsel were free to compel the jurors to disclose their deliberations. And given the secrecy of those deliberations, the burden imposed by the lower court is insuperable. Moreover, that the court intends to apply the requirement stringently is demonstrated by this very case, where the court held the prejudice standard unsatisfied by petitioner's demonstration that the foreman of the jury had had very considerable experience with firearms (App., pp. 26-27).

Northern Pacific neither requires nor supports the lower court's decision. In *Northern Pacific,* a challenge to a juror had been *allowed,* and the losing party claimed that it should not have been. This Court rejected that fanciful argument, stating: "A competent and unbiased juror was selected and sworn, and the company had, therefore, a trial by an impartial jury, which was all it could command." 116 U.S., at 646. But surely the rule that a party may not complain of *rejection* of a juror at the other party's behest as long as the jury ultimately selected is unexceptionable has no bearing whatever on the quite different problem of a party's complaint about the curtailing of his right to challenge the jurors that actually hear the case.

The correct principle, as stated in *Swain* v. *Alabama, supra,* is that "denial or impairment of the right [of per-

emptory challenge] is reversible error without a showing of prejudice, *Lewis* v. *United States, supra; Harrison* v. *United States,* 163 U.S. 140; cf. *Gulf, Colorado & Santa Fe R. Co.* v. *Shane,* 157 U.S. 348." 380 U.S., at 219.

We have found no court, except the one below, that has departed from this rule. The issue was specifically considered recently by the Court of Appeals for the Tenth Circuit in *Photostat Corporation* v. *Ball, supra,* a civil case. There, in an opinion by Chief Judge Murrah, the court concluded:

> "In this post-mortem inquiry, we cannot know of course what counsel would have done with the suppressed information. Nor can we take his post-mortem word for it. But we need not presume to speculate on the judgment he would have made. It is enough, we think, to show probable bias of the jurors and prejudice to the unsuccessful litigant if the suppressed information was of sufficient cogency and significance to cause us to believe that counsel was entitled to know of it when he came to exercise his right of peremptory challenge. If so, the suppression was a prejudicial impairment of his right." 338 F. 2d, at 787.

For other cases in which restriction of the *voir dire* affecting the right of peremptory challenge has resulted in reversals without a showing of additional prejudice, see, *e.g., Armborst* v. *Cincinnati Traction Co., supra; Kiernan* v. *Van Schaik, supra;* and *Bailey* v. *United States, supra.* Thus, the rule established by the lower court is in conflict with the rule prevailing in at least four other circuits.

3. *Improper refusal to inquire respecting jurors' financial interest in other gun manufacturing companies.* The Court of Appeals said nothing about petitioner's contention that her right to challenge both for cause and peremptorily were impaired by the trial judge's refusal to ask

the prospective jurors whether they had any financial interest in any gun manufacturing company other than Marlin. The *sub silentio* rejection of that claim, however, places the Second Circuit in conflict with the Third and Sixth Circuits.

In *Armborst* v. *Cincinnati Traction Co., supra,* a suit for personal injuries arising out of a streetcar accident, the trial judge denied plaintiff's request that the jurors be asked whether any of them were stockholders in any traction or steam railroad company. The Court of Appeals reversed a judgment for defendant, stating:

> ". . . Presumably the information was desired for the proper purpose of testing the qualifications and admissibility of the jurors, to enable an intelligent exercise of the right of at least peremptory challenge. This court has recognized the value of such right by saying that perhaps the most effective means of securing an impartial jury is 'through an intelligent and legitimate exercise of the right of challenge, both peremptory and for cause.' " 25 F. 2d, at 241.

And in *Kiernan* v. *Van Shaik, supra,* while recognizing the peculiar danger in automobile negligence cases when jurors are asked about their interests in insurance companies, the Court of Appeals nonetheless concluded:

> ". . . That men will be prone to favor that side of a cause with which they identify themselves either economically, socially or emotionally is a fundamental fact of human character. It is not enough, therefore, to grant the rights of peremptory challenge and challenge for cause and then limit the factual basis for their use to the visible appearance of the jurors and the scant information on the jury list. . . .
>
> • • • • •

"We hold, therefore, that in order to exercise intelligently his limited number of peremptory challenges and to determine whether ground exists for challenge for cause, a plaintiff in an accident case may make reasonable inquiry whether prospective jurors are or have been connected with the business of investigating or paying accident claims, either as employees, agents or stockholders of insurance companies or claims agencies. . . ." 347 F.2d, at 781, 782.

Since we take it that no one would suggest there be one rule for streetcar and insurance companies and another for firearms companies, there is no basis whatever for distinguishing these decisions from the case at bar.

Conclusion

We are aware that diversity personal injury cases do not play a large role in this Court's work. At the same time, this Court has upon occasion reviewed such cases in order to safeguard the right to jury trial even where legal principles of general applicability were not involved. See *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437. The decision in the case at bar not only affects the right to jury trial in this particular situation, but raises issues that are of large importance in the day-to-day trial of every type of jury case in the federal courts. Moreover, that decision is in conflict with decisions in other circuits and is, we submit, clearly wrong. We urge that in these circumstances the problem is of sufficient moment to engage the attention of this Court; and, if that be so, we suggest that there is no case in which review would be more desirable than one involving such a tragic injury to a young boy where the evidence of negligence is, at the least, substantial. Finally, although we are sensible of the very weighty reasons that generally deter this Court from summary reversals, at the same time we

suggest that the error in this case is so palpable that plenary hearing might properly be omitted. In light of these considerations, we request that the petition be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANCES METZGER WIRTH STEPHAN, Guardian of the Estate of CHARLES WIRTH, *Plaintiff-Appellant*,

against

THE MARLIN FIREARMS COMPANY, INC., *et al.*, *Defendant-Appellees.*

Before: LUMBARD, *Chief Judge*, SMITH, *Circuit Judge*, and LEVET, *District Judge.**

• • • • • • •

LEVET, *District Judge:*

The plaintiff appeals from a jury verdict in favor of four defendants in a diversity action which sought damages for injuries suffered by the plaintiff's ward in a hunting accident.

The action centers around one .22 calibre rifle, a Model 39A manufactured by appellee Marlin Firearms Company, Inc., in 1947. On September 23, 1961, appellee Charles Pavlick, then fifteen years old, accompanied by his uncle, appellee John Misciuch, purchased the rifle in question, second hand, from a retail gun shop run by appellee Landers. Pavlick was too young to buy the rifle himself, but it was purchased by Misciuch and turned over to Pavlick in Landers' prescence. This rifle had an exposed hammer which contained both a full-cock and a half-cock notch, the latter being a safety position.

Shortly after the purchase, the rifle jammed while Pavlick was using it. He returned it to Landers, who, in turn, sent it to Marlin for repairs. Marlin repaired the rifle, test-fired it, and returned it to Landers who, without testing it himself, gave it back to Pavlick.

On November 2, 1961, Pavlick went hunting with Charles Wirth. While walking single file, with Wirth in front,

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* Sitting by designation.

Pavlick attempted to put the Marlin rifle on safety, but his thumb slipped off the hammer. Thereupon the gun discharged, the bullet striking Wirth in the back. Wirth's spinal cord was severed, causing permanent paraplegia. Pavlick was inexperienced in the use of firearms, although he had taken some National Rifle Association safety courses, had examined gun periodicals, and had talked with Wirth, who had experience with guns.

After the accident, Frances Stephan, guardian of the estate of Charles Wirth,[1] instituted this action to recover damages from any or all of four defendants, Marlin, Pavlick, Misciuch, or Landers, for the severe bodily injuries suffered by Wirth in the hunting accident. The complaint alleged negligence against all four defendants as well as breach of warranty against Marlin and Landers. After trial before a jury, a verdict was returned in favor of all the defendants. Plaintiff, now appellant, then moved for judgment notwithstanding the verdict but her application was denied because she had not moved for a directed verdict. Fed. R. Civ. P. 50(b). She further moved for a new trial, which was denied after full argument in open court. Plaintiff appeals from the judgment and the denial of her motion for a new trial.

Appellant raises four grounds on this appeal: (1) that appellant was denied both a fair trial and due process of law by reason of alleged limitations placed by the trial court on the scope of the voir dire examination of prospective jurors; (2) that the trial judge committed error by holding inadmissible a hammer with an offset spur, manufactured by appellee Marlin; (3) that the trial judge erroneously refused to grant certain requests to charge; and (4) that the jury's verdict is inconsistent and against the weight of the evidence. We affirm the judgment.

I. The Voir Dire

A careful examination of the transcript of the voir dire reveals that appellant has no ground for complaint. During

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[1] A motion to dismiss on the ground that plaintiff Stephan was appointed guardian for the express purpose of conferring diversity jurisdiction was denied. This court affirmed *per curiam*. 325 F. 2d 238 (1963).

the course of the voir dire, one prospective juror was excused for cause after revealing his expertise in guns. Appellant then requested the trial judge to inquire into the experience of all the jurors. Judge Timbers refused because such an inquiry would take too long and would be too broad in scope, although he appeared to be willing to ask whether any of the prospective jurors was expert in the use or repair of guns. Instead, appellant's counsel requested that the question be narrowed to whether any prospective juror was a member of the National Rifle Association or any gun club; Judge Timbers acquiesced in this request and asked the question as limited by counsel.

Considerable discretion is lodged in the trial court as to questions asked in the voir dire. *Application of Cohn,* 332 F. 2d 976 (2nd Cir. 1964); *Fredrick* v. *United States,* 163 F. 2d 536, 550 (9th Cir.), cert. denied 332 U. S. 775 (1947), citing *Connors* v. *United States,* 158 U. S. 408 (1895). An appellate court is not free to interfere with a trial court's ruling in this area unless an abuse of discretion is shown. *Spells* v. *United States,* 263 F. 2d 609, 612 (5th Cir.), cert. denied 360 U. S. 920 (1959); *Butler* v. *United States,* 191 F. 2d 433, 435 (4th Cir. 1951). While it would be an abuse of discretion to refuse to inquire whether a juror has a fixed opinion which is dispositive of an issue in the case, no such question was requested here. Appellant did not request an inquiry as to whether any juror had an opinion on the adequacy of the Marlin safety mechanism; counsel's request was general and imprecise and was properly refused in light of the fact that each prospective juror was alerted to indicate whether his own experience would prejudice his verdict when a juror was disqualified because of expertise. There is no evidence in the record that appellant was denied the information necessary to exercise an intelligent use of her peremptory challenges. Compare *Kiernan* v. *Van Schaik,* 347 F. 2d 775 (3rd Cir. 1965). Moreover, as long as an impartial jury is selected, neither party has any complaint, at least in a civil case. *Northern Pacific R.R. Co.* v. *Herbert,* 116 U. S. 642, 646 (1886).

Appellant, further, submitted an affidavit to show that one juror was an "expert" in firearms based on his service in the United States Army, but she failed to show that any bias resulted from this knowledge. A verdict may not prop-

erly be based on a juror's personal knowledge which is not part of the evidence, but as *W. C. Viall Dairy, Inc.* v. *Providence Journal Co.*, 79 R. I. 416, 89 A. 2d 839 (1952), cited by appellant, notes, the proper manner for protecting the parties from jurors' personal knowledge is to instruct them not to import into the case their personal knowledge. Judge Timbers' charge told the jury very clearly to consider only the evidence introduced in the case. Appellant's speculations that this juror with his weapons "expertise" must have influenced the jury to her prejudice are no basis for reversing the judgment and granting a new trial here. In absence of a contrary showing, it must be assumed that the jury followed the court's instructions. *Baltimore & Ohio R.R. Co.* v. *Felgenhauer*, 168 F. 2d 12, 17 (8th Cir. 1948); *Crockett Engineering Co.* v. *Ehret Magnesia Mfg. Co.*, 156 F. 2d 817, 820 (D. C. Cir. 1946); *Husky Refining Co.* v. *Barnes*, 119 F. 2d 715, 717 (9th Cir. 1941).

II. Exclusion of the Hammer

Appellant's second claim is that the trial court erred in excluding from evidence a hammer with an offset spur manufactured by Marlin subsequent to the marketing of its 1947 model. Appellant offered the offset spur during its redirect examination of Harry A. Teator, a Marlin employee who had testified that the spur was a new device installed on guns having a telescopic sight. Judge Timbers' ruling is preceded in the record by a lengthy colloquy that sets forth appellant's arguments for admissibility and the reasons why Judge Timbers excluded this offer. We find no error.

Appellant argued to Judge Timbers that the offset spur was evidence that the safety mechanism on Pavlick's rifle was defective in design. Judge Timbers ruled that this subsequent technological improvement was not relevant to the question of negligent design and that, even if revelant, it was excludable because evidence of subsequent repairs is not admissible to prove negligence.

Under Connecticut law, evidence as to remedial measures taken after an accident is excluded on the basis of a policy to encourage repairs. See *Shegda* v. *Hartford-Connecticut Trust Co.*, 131 Conn. 186, 38 A. 2d 668 (1944).

The offset spur, however, represented a technological improvement not prompted by a specific prior injury; thus, the exclusionary "repairs" doctrine did not squarely apply here. Nevertheless, we conclude that Judge Timbers' alternative ground was an appropriate exercise of his discretion, namely, that a subsequent technological improvement such as the offset spur was not relevant, according to principles of "American ingenuity of design manufacture," to the issue of prior negligent design.

Appellant also argued that the existence of the offset spur would demonstrate that Marlin had a continuing duty requiring it to install this improvement when Pavlick's gun was returned for repairs. Judge Timbers held that, unless the orginial design was inherently unsafe, Marlin was under no duty to install an improvement in design when the gun was submitted for specific, unrelated repairs. Finding insufficient independent evidence indicating that Marlin's 1947 design was faulty and no evidence either that the offset spur was a safety improvement or that it could be used on rifles, like Pavlick's, lacking a telescopic sight, Judge Timbers ruled that the spur was not relevant to Marlin's alleged negligence. He "sustain[ed] the objection with leave to the plaintiff to renew the offer, if there should be appropriate occasion, based on a change in the record in its present status." We agree with this ruling. Moreover, appellant did not attempt to offer the spur again along with additional evidence establishing its relevance; hence, she was not prejudiced by the Judge's ruling that, as to this ground, the offer was at best premature.

Lastly, appellant argued that the offset spur should be admitted to impeach the credibility of Teator, Marlin's employee.[2] However, it does not appear from the record that the existence of the offset spur significantly contradicted the testimony of Teator. Teator did testify that there had been no changes in the half-cock safety device

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[2] Marlin raises the issue whether Rule 43(b) of the Federal Rules of Civil Procedure allows appellant to attack the credibility of Teator, her own witness, since he was not "an officer, director, or managing agent of a * * * corporation * * * which is an adverse party," as required by the rule. We need not decide this question, however, since we find other sufficient reasons for sustaining Judge Timbers' ruling.

after 1947. But he did not testify, as appellant here claims, that no technological changes were made in the Model 39A rifle after 1947. Instead, he admitted the development of the offset hammer spur but claimed that the spur could only be used on guns with a telescopic sight and that it had no effect on the half-cock safety device. All in all, we conclude that appellant was not prejudiced by the exclusion of this evidence.

III. Charge to the Jury

Appellant urges that several of her requests to charge directed to Marlin's duty as manufacturer and repairer of the rifle were improperly refused. However, an examination of the charge and a comparison with the requests convince us that the requests refused either were incorporated in substance in the charge or do not state the law of Connecticut, applicable to the present case. Specifically, Requests 3, 4, 5, 11a and 18 were covered in substance. Request 7, dealing with the burden of going forward with the evidence after plaintiff has shown the existence of danger, states the law of Massachusetts, see *Sylvania Electric Products, Inc.* v. *Barker*, 228 F. 2d 842 (1st Cir. 1955), cert. denied 350 U. S. 988 (1956), but appellant has not cited and we cannot find any authority holding that the rule stated in Request 7 is the law of Connecticut. With regard to Requests 6, 8 and 11, appellant did not preserve objections as required by Rule 51 of the Federal Rules of Civil Procedure. In any event, since the matter therein was adequately submitted to the jury, appellant has no basis for complaint. Read in its entirety, Judge Timbers' charge was wholly appropriate.

IV. Verdict Inconsistent and Against the Evidence

Appellant's fourth and final contention, that the verdict is inconsistent and against the weight of the evidence, is based upon her erroneous assumption that one of the defendants must be held liable. Such a theory may be novel, but it is not the law. Rather, our duty is solely to review the record to determine whether there was sufficient evidence to support the jury's verdict in favor of each defendant. We need not decide whether a state or federal

standard determines the sufficiency of the evidenc to support a jury verdict in a diversity case, see *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437, 444-45 (1959); *Mercer* v. *Theriot*, 377 U. S. 152, 157 (1964), as the jury's verdict here will stand even under the stricter standard.

From the evidence, we conclude that the jury could have found that the design of the Marlin rifle was safe so that neither a duty to warn nor a duty to install a new safety mechanism nor a breach of warranty existed on Marlin's part. As to Landers, the jury was justified from the relevant evidence in finding him not negligent when he sold a rifle to an adult even though he might believe that a minor would be its principal user. As to Misciuch, the pertinent evidence reveals both that he took no part in Pavilck's use of the rifle and that he obtained the permission of the boy's mother to purchase the rifle; on this evidence the jury could have absolved him. See *Wood* v. *O'Neil*, 90 Conn. 497, 97 Atl. 753 (1916). With regard to Pavlick, Connecticut law, unlike the law of many jurisdictions, does not require the person handling the gun to establish that the accident was unavoidable before he may be held blameless in cases such as the one at bar. *Wood* v. *O'Neil, supra.* Compare *Hawksley* v. *Peace*, 38 R. I. 544, 96 Atl. 856 (1916). In the *Wood* case, a sixteen-year old boy and his parent were sued for damages arising out of an accident in which the boy had killed a young girl with a shotgun given to him by his parents. The Supreme Court of Errors of Connecticut affirmed a nonsuit in favor of the defendant parents, finding no evidence that they had placed the gun in the boy's hands with knowledge that the gun was defective or that the boy was a careless user of guns;[3] it also affirmed a jury verdict for the defendant boy, finding that the evidence as to the boy's negligence was

[3] Appellant contends that *Wood* v. *O'Neil* was overruled in *Jones* v. *Izzo*, 21 Conn. Supp. 28, 43 A. 2d 460 (Super. Ct. 1958). We disagree. The *Jones* v. *Izzo* court, in affirming a jury verdict *against* the parents of a boy who had accidentally injured another with a power saw, merely said that *Wood* v. *O'Neil* appeared to be against the weight of authority in other jurisdictions. *Jones* v. *Izzo* did not face the question, as did *Wood*, of whether the jury could find *in favor of* parties in the position of Misciuch and Pavlick here.

conflicting. Here, we are constrained to hold that the jury, on the basis of the proof as to Pavlick's age and lack of experience, had sufficient grounds for finding the shooting accidental and Pavlick not negligent according to the standard of care set for those his age.

In short, there is sufficient evidence to support the jury's verdict, and there is nothing inconsistent about it. To be sure, the verdict is not a happy one for the plaintiff, but, as long as recovery in tort is based on fault, it is axiomatic that there will be some injuries which remain uncompensated.

Affirmed.

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In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1120

FRANCES METZGER WIRTH STEPHAN, GUARDIAN OF THE ESTATE OF CHARLES WIRTH, *Petitioner*,

vs.

THE MARLIN FIREARMS CO., INC., GERHARD HOHN, ADMINISTRATOR OF THE ESTATE OF F. A. LANDERS, JOHN MISCIUCH AND CARL PAVLICK, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INDEX

	PAGE
Opinion Below	1
Question Presented	1
Statutes, Rules and Constitutional Provisions Involved	2
Statement of the Case	
I. General Background	2
II. Events on the Voir Dire	4
Argument	
I. Petitioner's Post Trial Investigation of a Juror Could Have Been Accomplished Long Before Trial	8
II. There is no Conflict of Decision	9
Conclusion	13

CITATIONS

	PAGE
Butler vs. *United States*, 191 F.2d 433, 435 (4th Cir. 1951)	10
Dennis vs. *United States*, 339 U.S. 162	11
Frazier vs. *United States*, 335 U.S. 497	11
Frederick vs. *United States*, 163 F.2d 536 *cert. denied*, 68 S. Ct. 87, 332 U.S. 775	11
Kiernan vs. *VanSchaik*, 347 F.2d 775 (3d Cir. 1965)	10
Photostatic Corporation vs. *Ball*, 338 F.2d 783 (10th Cir. 1964)	10
Scales vs. *United States*, 227 F.2d 581, *cert. denied* 76 S. Ct. 542, 350 U.S. 992	11
Speak vs. *United States*, 161 F.2d 562	11
Speils vs. *United States*, 263 F.2d 609, at 612, *cert. denied* in 79 S. Ct. 1439, 360 U.S. 920, 3 L. Ed. 2d 1535	9
Swain vs. *Alabama*, 380 U.S. 202	10
United States vs. *Sferas*, 210 F.2d 69, *cert. denied*, *Skally* vs. *United States*, 74 S. Ct. 630, 347 U.S. 935	11
Yarborough vs. *United States*, 230 F.2d 56 *cert. denied*, 76 S. Ct. 1034, 351 U.S. 969	11

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT, THE MARLIN FIREARMS CO., INC. IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit is reported in 353 F.2d 819.

QUESTIONS PRESENTED

Where the trial court was induced to ask a much narrower question on the Voir Dire than had been previously requested

by Petitioner's counsel, can Petitioner now claim an abuse of discretion by the trial court in its conduct of the Voir Dire?

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent Federal Rule and Amendment to the Constitution and Statute are set forth in the petition at page 2.

STATEMENT OF THE CASE

I. — General Background.

This lawsuit involved a gun, millions of which type have been made by the defendant Marlin since at least 1891. It was a .22 caliber rifle with an exposed hammer which contained a full-cock notch and a half-cock notch. The gun had a safety position which was the half-cock notch. Marlin made the particular gun in question in 1947. It was sold to a firm in New York city. Thereafter, it passed through the hands of others until, eventually, it was sold to a dealer named Benton, in October, 1960, in Rockville, Connecticut. He put the gun through extensive tests before he bought it. He sold it in February, 1961, to another dealer named Landers from Norwalk. Landers sold it to Pavlick and/or his uncle Misciuch.

Landers showed Pavlick how the safety worked. The plaintiff Wirth, more experienced and older than Pavlick, figured out himself how the gun operated and showed it to Pavlick.

They both took a hunter-safety course from a Mr. Fay at the Norwalk Armory. This was the N.R.A. course. During Pavlick's first session in the course, during which he used the

gun in all its various ways, he found the gun jammed. This particular complaint had nothing to do with the safety position of the gun and there were no complaints about it.

Pavlick returned the gun to Landers who brought it to New Haven and the Marlin plant. Landers was familiar with the repair department at Marlin and he knew that the gun was properly repaired and then heard it test-fired. He stated he knew from past experience Marlin would not return the gun unless it was perfectly all right. He was charged one dollar for the work and there was no tag or shop order or slip made out in connection with the work. He then returned it to Pavlick without charge. The repairs in no way involved the safety position.

On November 2, 1961, these two teenage boys, Pavlick and Wirth, went hunting. After they got out of the car, Pavlick put the gun on safe, without any trouble. In fact, up until the time of the fatal slip, Pavlick had put the gun in the safety position several times without difficulty. The boys came to a log where Pavlick fired at the log to flush out game. Nothing happened so Pavlick put the gun on safe once again and the boys continued on into the woods. They came to a second log where the procedure was repeated. This time, however, as Pavlick was putting the rifle into the safety position, and at a time when Wirth was walking directly in front of him, Pavlick's thumb slipped off the hammer and the weapon fired, striking his friend in the back.

Upon the trial of this case, before a jury of twelve, the basic facts were not in dispute. On the issue whether the gun was or was not reasonably safe, there was conflicting evidence. Plaintiff's expert witness said it was not. (A. 163-255) [1]. The

[1] References to the extract of the record printed as an Appendix for the Court of Appeals by Petitioner are designated as "(A. —)".

defendant Marlin produced several witnesses who testified the gun was reasonably safe, including Mr. Teator (R. A. 114a), Mr. Robinson (R. A. 151a), Mr. Benton (R. A. 204a), and Mr. Kuhlhoff. (R. A. 227a) [2]

There were several other areas of testimony where Petitioner's gun expert said one thing and Respondent's experts said the opposite. The boy who was holding the gun testified it was simply a case where his thumb slipped off the hammer and it was purely an accident. The jury deliberated for several hours over a period of two days and had read back to it much of the testimony, none of which involved the experts. (R. A. 267a) The jury returned a defendant's verdict and answered several specific interrogatories relating to each defendant. Petitioner appealed from the judgment in the denial of her Motion For a New Trial on several grounds. The Court of Appeals affirmed on all points.

II. — Events On The Voir Dire.

Pursuant to Rule 47(a) of the Federal Rules of Civil procedure, and the practise in the District Court for Connecticut, the trial judge conducted the Voir Dire examination himself, interrupting for conferences at the Bench and suggestions from counsel. A reading of the entire Voir Dire examination as set forth in the Appendices of Petitioner and Respondent, and the transcript of the examination on file, will disclose that at the outset the trial court exercised great care to inform the jury panel of all the relevant considerations necessary in order

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[2] References to the extract of the record printed as an Appendix for the Court of Appeals by the Respondent are designated as "(R. A. —)".

to insure the selection of an impartial jury. After the initial questions identifying the attorneys and clients and after pointing out that the case involved the manufacture, sale, repair and discharge of a .22 caliber rifle, a particular juror stood up and made it known that he had considerable experience in connection with firearms. The court inquired of the gentleman, Mr. Buchalter, if his experience would impair his capacity to serve impartially.

Thus, at the very outset of the Voir Dire the entire panel was alerted to the fact that any experience relating to firearms should be disclosed. It is the speculative claim of Petitioner that perhaps one juror finally selected was a so-called gun expert. The choice of words was that of the Court of Appeals. (Appendix A. of Petition, p. 27)

Thereafter the trial court inquired of the panel if there was anyone who had heard of or knew anything about the case or whether there were any other circumstances that would occur to anyone that had not been disclosed and that would bear upon their qualifications to serve. (A. 5a)

Thereafter followed the particular discussion at the Bench which forms the basis for Petitioner's claim that her right of peremptory challenge was impaired by limitations of the trial court.

At the Bench, the following occurred:

> "The COURT. I know that and I will try to take that into account in ruling finally on challenges for cause. I think we can end up with a jury satisfactory to all concerned, but I really think this question about are there anybody familiar with the use of firearms is going to lead nowhere. It certainly isn't going to produce challenges for cause as far as I'm concerned. There are men who have been in

the military service here. It is one of those questions that gives rise to idle chatter it seems to me. I will be glad to ask whether anyone has been in the business of repairing firearms or expert of any sort, if you wish, but I think in a country where every citizen has a right to bear arms, it's like asking in a tax case whether anybody has filed their income tax returns or had any trouble with them.

Mr. DESMOND. Your Honor, on that point would it be possible to ask a narrow question as to whether they belong to the National Rifle Association or any gun club? That would narrow it down.

The COURT. Well I think that's fair enough. I'd be inclined to.

Mr. KOSKOFF. I have one other question and that is does anybody—

The COURT. Just a second now. Member of the National what?

Mr. DESMOND. Rifle Association or any gun club.

The COURT. I will do that much."

Thereafter, the court did inquire of the panel whether anyone was a member of the National Rifle Association and whether anyone was a member of any gun club. In other words, the court indicated that it was willing to ask whether any prospective jurors had been in the business of repairing firearms or expert of any sort. However, in view of the statement of Mr. Desmond, counsel for the Petitioner, the court was asked to make a much more narrow inquiry to the jury as to whether anyone on the panel belonged to the N.R.A. or any gun club.

Obviously, were it not for the appeal of Petitioner's counsel to the court to narrow down the court's proposed inquiry, the court would have made the specific inquiry of whether or not any of the prospective jurors was an expert of any sort.

Having induced the court to forego asking the panel if anyone was an expert of any sort, it hardly seems fair at this point to make claim that the court committed error in its conduct of the Voir Dire examination because of its failure to make the other inquiries.

The Circuit Court of Appeals obviously recognized the fact that the action of the trial court was induced by plaintiff's counsel. It points out that the court acquiesced in the request and did indeed ask the question as limited by counsel. (Opinion of Court of Appeals, Petition p. 26)

Further, the trial court out of an excess of caution, reiterated the question concerning the National Rifle Association or membership in any gun club. (R. A. 12a)

After the jury and alternates had been selected the trial court instructed the panel (R. A. 24a) as follows:

> "In any event you will not be obliged to be here any further until the trial of this case is actually ready, until we're ready to go forward in the taking of the evidence. In the meantime please be careful not to discuss this case with anyone, don't let any information about it come to you. If you by any chance live in the Fairfield County area be careful not to listen to anything about the case or read anything about it, if there should be anything about it in (Tr. 54) the newspaper.
>
> It is obviously a case of importance by both sides and we want it tried by a completely impartial jury."

ARGUMENT

I.

PETITIONER'S POST TRIAL INVESTIGATION OF A JUROR COULD HAVE BEEN ACCOMPLISHED LONG BEFORE TRIAL.

Petitioner's brief, page 11, refers to a post trial investigation of the jury foreman. It is claimed said investigation demonstrates probable prejudice on the part of the juror.

In fact, Petitioner expressly and unequivocally withdrew any claim concerning prejudice during oral argument in the Circuit Court of Appeals on October 20, 1965. During argument by Respondent Marlin, its counsel began to address itself to this issue of claimed prejudice growing out of said post trial investigation. He was interrupted by Petitioner's counsel who stated that any claim with reference to said investigation was withdrawn. Respondent's counsel, therefore, immediately ceased discussion on that issue.

In spite of said withdrawal the Circuit Court of Appeals nevertheless referred to said investigation in its opinion, characterizing Petitioner's claims as speculative and pointed out that Judge Timbers very expressly charged the jury to base its decision only on the evidence introduced in the case.

The Court had reference to the following excerpts in the charge:

> "In your task of determining the issues I've just summarized in this case, you may only consider the evidence which has been introduced in the case, obviously." (R. A. 27a)
>
> "In conclusion, ladies and gentlemen, take this case to the jury room, determine the facts on the basis of the evi-

dence as you have heard it, apply the law as I have attempted to outline it to you, then render a verdict fairly, uprightly and without a scintilla of prejudice, which I am sure is unnecessary to say to you ladies and gentlemen." (R. A. 30a)

The jury was chosen on Friday, January 24, 1964. Trial did not commence until Thursday, February 13th, some three weeks later. The jury was composed of nine men and three women. (R. A. 21a) If Petitioner was dissatisfied with the jury as selected, and if she desired to pursue the claimed error on the Voir Dire, ample time was available to conduct said investigation prior to trial in the same fashion as occurred following the adverse jury verdict. Then, when counsel reconvened on February 13th, Petitioner could have made any objection it desired to any juror or jurors allegedly tainted.

II.

THERE IS NO CONFLICT OF DECISION.

The basic rule applicable is that a considerable discretion is lodged in the trial court as to questions to be posed in the Voir Dire.

> "The questions that should be asked upon a voir dire examination is a matter of discretion; and that discretion belongs to the trial court, not to us. Ours is the duty only to examine the record to determine whether that discretion has been abused."
>
> *Speils* vs. *United States*, 263 F.2d 609, at 612, *cert. denied* in 79 S. Ct. 1439, 360 U.S. 920, 3 L. Ed. 2d 1535.

In *Butler* vs. *United States*, 191 F.2d 433, 435 (4th Cir. 1951) the Court of Appeals stated: "This Court is not free to interfere unless a clear abuse of discretion is shown."

Petitioner relies heavily on *Swain* vs. *Alabama*, 380 U.S. 202. *Swain* in no way alters the basic rule. There this Court reviewed a rape conviction of a negro and the use by a state court prosecutor of peremptory challenges to exclude negroes from the jury. The case did not involve the conduct of a Voir Dire examination by a Federal District Trial Court under Rule 47(b) but rather the practise of exclusion of negroes in Talladega County, Alabama.

Further reliance is placed on *Kiernan* vs. *VanSchaik*, 347 F.2d 775 (3d Cir. 1965). The Court below was well aware of *Kiernan*, (Petitioner's Appendix p. 26), where specific written interrogatories were submitted to the trial court concerning the insurance question in a jurisdiction having a local custom forbidding a detailed Voir Dire. As pointed out below counsel's request was general and imprecise and in fact the jurors were alerted to indicate whether their experience would prejudice a verdict after a particular juror had been disqualified because of expertise.

Petitioner further relies on *Photostatic Corporation* vs. *Ball*, 338 F.2d 783 (10th Cir. 1964). Once again, this case did not involve the conduct of the Voir Dire by the trial court, as such, as allegedly limiting counsel's peremptory challenges, but in fact concerned misunderstanding by the jurors of the Voir Dire questions of the court. Several jurors testified after the trial they had misunderstood the import of the questions. It can hardly be claimed here that the trial court's questions were misunderstood. Again, the decision does not depart from the general proposition of the Court's broad discretion.

It is not true, as claimed, (Petition p. 17) that the Court of Appeals treatment of the issue was conclusory and that no other justification for the trial court's ruling could have been advanced beyond the fact the proposed question was not relevant to challenges for cause. The opinion below noted Judge Timbers' refusal of the proposed inquiry because it was too broad in scope and was imprecise. More importantly, as previously noted, Judge Timbers was willing to inquire as to expertise but instead, Petitioner requested a different and more specific inquiry which was then made.

Several other decisions support the basic rule applicable to this case that the trial court has considerable discretion in its conduct of the Voir Dire. In *United States* vs. *Sferas*, 210 F.2d 69, *cert. denied*; *Skally* vs. *United States*, 74 S. Ct. 630, 347 U.S. 935, it was said that the qualifications of a juror rests in the sound discretion of the trial court and its rulings should not be interferred with on appeal except on a clear showing of abuse.

Accord: *Frederick* vs. *United States*, 163 F.2d 536 *cert. denied*, 68 S. Ct. 87, 332 U.S. 775. *Speak* vs. *United States*, 161 F.2d 562. Also, *Yarborough* vs. *United States*, 230 F.2d 56 *cert. denied*, 76 S. Ct. 1034, 351 U.S. 969, and *Scales* vs. *United States*, 227 F.2d 581, *cert. denied* 76 S. Ct. 542, 350 U.S. 992.

Petitioner also claims error in the refusal of the trial court to inquire whether any member of the panel owned stock in any company that manufactured guns. The court had already inquired of the panel (R. A. 4a) if anyone had been an employee, stockholder, director or officer of the Respondent Marlin Firearms Company and whether the jurors and members of their families had been in any way connected with Marlin.

Counsel were also asked to name all of the witnesses they proposed to call, which was done. (R. A. 13a, 14a)

The proposed inquiry was hardly relevant. There is no reason to expect that interest in some other gun company other than the Respondent Marlin would have any bearing on a particular juror's view of the case. The absence of authority on this particular point would indicate that it is hardly an important question of federal law requiring treatment by this court. This court has held that in a criminal case prosecuted by the government for the violation of a federal statute that jurors are not challengeable nor is there any implication of bias on their part simply because the jurors are employees or related to employees of the government. *Dennis* vs. *United States*, 339 U.S. 162; *Frazier* vs. *United States*, 335 U.S. 497.

Once again the real question is whether or not a clear abuse of discretion on the part of the trial court was shown. Bearing in mind the court's admonitions to the jury to only consider the evidence introduced in the case (R. A. 27a), and to render a verdict fairly, uprightly, and without a scintilla of prejudice (R. A. 30a) and the obvious care with which the trial court conducted the Voir Dire examination, Petitioner's claim falls far short of demonstrating said abuse.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be denied. A reading of the Voir Dire indicates the trial court carefully conducted the Voir Dire with the result that a fair and impartial jury was selected. As stated by the Court of Appeals below there is no evidence in the record that Petitioner was denied the information necessary to exercise an intelligent use of her peremptory challenges. Petitioner stresses the fact that the injury was most severe. The Court below was well aware of the extent of injury. The inquiries that were addressed by the trial court to the panel were more than sufficient to insure the selection of an impartial jury. Petitioner has failed to demonstrate an abuse of the trial court's wide discretion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Martin E. Gormley, counsel for respondent, in opposition to the petition for a writ of certiorari and a member of the bar of the Supreme Court of the United States do hereby certify that on the 12th day of May, 1966, I served a copy of the foregoing brief in opposition upon the petitioner by mailing a copy thereof, postage prepaid, to Alfred F. Scanlon, Esq., counsel for petitioner, 734 15th Street, N.W., Washington, D.C.

MARTIN E. GORMLEY,
Counsel for Respondent.

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IN THE

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OCTOBER TERM, 1965

No. 1120

FRANCES METZGER WIRTH STEPHAN, Guardian of the Estate of CHARLES WIRTH, *Petitioner,*

v.

THE MARLIN FIREARMS CO., INC., GERHARD HOHN, Administrator of the Estate of F. A. LANDERS, JOHN MISCIUCH and CARL PAVLICK, *Respondents.*

PETITIONER'S REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

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May 20, 1966

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PETITIONER'S REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

The petition for *certiorari* rests basically upon three contentions: first, that petitioner's right of peremptory challenge was improperly curtailed by the trial judge's refusal to inquire on *voir dire* about the prospective jurors' experience with firearms; second, that the Court of Appeals erred in holding that petitioner could not complain unless she affirmatively showed that she had been prejudiced; and, third, that the trial court erred in refusing to inquire whether any prospective juror had a financial interest in gun manufacturing companies other than respondent Marlin. Petitioner asserts that each of these questions is important and that there is a conflict of decision as to each of them.

The brief in opposition makes no reference whatever to the Court of Appeals' determination with respect to the necessity of showing prejudice. Evidently respondents

found no basis upon which to challenge petitioner's contention that this ruling rested upon a misreading of *Northern Pacific R.R. Co.* v. *Herbert*, 116 U.S. 642, and that the ruling is, moreover, in conflict with the decisions of this Court and of at least four other circuits.

Moreover, respondents make only passing reference to the issue respecting the jurors' financial interest in gun manufacturing companies. Basically, respondents' position is that such an interest would be "hardly relevant" (Br. Opp. p. 12). But this contention simply underscores the conflict between the decisions below and the rule applied in two other circuits, where the courts, as we have shown (Pet. pp. 21-22), take quite a different view of relevancy.[1]

In dealing with the contention that the trial judge erred in refusing to ask the jurors about their experience with guns, respondents make several alternative contentions. First, respondents attempt to evade the issue by asserting, quite incorrectly, that petitioners' counsel were concerned only with excluding any "gun experts" from the jury. From that faulty premise, respondents conclude that petitioner can have no complaint, because the judge was willing to ask whether anyone was an expert. (See Br. Opp., pp. 5, 7.)

But the question petitioner presents rests, not upon the court's failure to ask whether any prospective juror was a gun expert, but upon the court's refusal to make a much different inquiry designed to disclose broadly what the prospective jurors knew about, and how they felt about, guns.

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[1] Respondents' reliance on *Dennis* v. *United States*, 339 U.S. 162, and *Frazier* v. *United States*, 335 U.S. 497, is misplaced. Not only did those cases involve only challenges for cause, but also the Court indicated that the parties were entitled to explore thoroughly the matter of government employment as it might influence a particular prospective juror. See, *e.g.*, *Dennis*, *supra*, at 168.

As the transcript—which is quoted in detail in the petition (pp. 8-10)—clearly discloses, three distinct lines of interrogation were discussed. The opening, and primary, request of petitioner's counsel was that they would "like to know whether any members of the panel own any guns or have any familiarity with firearms or anybody in their family, or whether they do any hunting; that kind of thing," because counsel believed they were "entitled to know whether they've had experience with guns and take our choice" (Pet. p. 9). The judge rejected this request, because "this question about are there anybody familiar with the use of firearms is going to lead nowhere. It certainly isn't going to produce challenges for cause as far as I'm concerned" (Pet. p. 10).

The judge then volunteered to ask the much more restricted, and quite discrete, question "whether anyone has been in the business of repairing firearms or expert of any sort," and agreed to the suggestion of petitioner's co-counsel that the jurors be asked whether any of them belonged to a gun club (Pet. p. 10).

In short, the court was unwilling to probe into the jurors' experience and familiarity with firearms except to the extent that they might be experts, for he believed that only professional expertise might be a ground for challenge for cause. But petitioner's counsel asserted their right to a broader inquiry, and that assertion, we submit, was firmly based upon petitioner's right to peremptory challenge. Counsels' interest in learning whether a prospective juror "owned any guns," or "had any familiarity with firearms," or "did any hunting," or whether "anybody in [his] family" was familiar with guns, reflected a concern quite different from whether a juror was a firearms expert. For example, petitioner's counsel might reasonably have be-

lieved that a gun expert would regard a rifle with an outmoded safety mechanism as a dangerous instrumentality, but that this might not be true of an inexperienced but enthusiastic hunter; and counsel would have been particularly concerned about a person who had used a rifle for years without accident if that rifle had a safety mechanism like the Marlin's. As counsel said, "I think we're entitled to know whether they've had experience with guns and take our choice."

The court, however, eliminated that choice, and our claim is that this limitation on *voir dire* represented an illegitimate encroachment upon petitioner's right of peremptory challenge. This issue is substantial, and the lower courts' disposition of that issue is in conflict with the decisions of other courts. The question as respondents would have it (pp. 1-2)—"Where the trial court was induced to ask a much narrower question on the Voir Dire than had been previously requested by Petitioner's counsel, can Petitioner now claim an abuse of discretion by the trial court in its conduct of the Voir Dire?"—is not relevant to this case. We add that, if that question were relevant, respondents cause would hardly be advanced. If a trial judge deprives a party of a substantial right by refusing to ask a broad question, the party's counsel does not waive the error by "inducing" the court to ask narrower questions.

Respondents make three additional arguments. First, they seem to contend that, assuming petitioner's interest went beyond the uncovering of "gun experts," the fact is that "at the very outset of the Voir Dire the entire panel was alerted to the fact that any experience relating to firearms should be disclosed" (Br. Opp. p. 5). Evidently this assertion rests upon a mistaken notion that the prospective juror who was a firearms inspector was excused

as soon as he revealed his profession. But whatever the basis for the contention, the fact is that it is wholly unsupported by the record. The salient facts, which are summarized in more detail in the margin, are that the expert was *not* excused when he disclosed his occupation; that the judge thereafter explicitly assured the jury that they need *not* be concerned about having had experience with firearms; and that the expert was excused only at the end of the *voir dire,* after he had stated that he knew personally the expert witness for the plaintiff and that he had one of his writings.[2] The suggestion that in these circumstances the refusal of the trial judge to pursue the line of inquiry requested by petitioner's counsel was somehow rectified because the jury knew it should disclose the desired information is, we submit, genuinely frivolous.

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[2] When the prospective juror volunteered that he was a gun inspector, the judge, as we indicated in the petition (pp. 8, 11), did not excuse him. He simply asked him whether he could try the case fairly, the juror responded that he could, and the judge said "Thank you" (R. pp. 12-14). Later, as we also pointed out in our petition (pp. 10-11), the judge told the jury, "I'm not going to ask whether any of you have had experience in the use of firearms. I would assume all have had in some capacity or another all being citizens of the United States who have a right under the Constitution to bear arms, and some others who have had a duty to do so" (A. 9). Then, practically at the conclusion of the *voir dire* when the judge asked the panel whether they knew any of the prospective witnesses who had been named, the gun expert said that he knew petitioner's expert witness and that he had one of his books on firearms (R. 38); but even then the judge said nothing and did not excuse him. Respondents' counsel shortly thereafter, at a bench conference, challenged the gun expert; but it was not until all of the questioning on *voir dire* had ended that the prospective jurors knew that the gun expert, as well as some others, were not to be on the panel; and then only because their names were not included on the list of 27 names constituting the basic list from which 12 were to be chosen (R. pp. 46-47).

All that could possibly be inferred from this sequence of events is that the prospective jurors, at the *end* of the *voir dire,* might have thought a juror who was a gun expert and who also knew one of the expert witnesses to be called and was familiar with his writings should not serve.

Respondents' next argument is equally insubstantial. They maintain that the restriction on *voir dire* was not prejudicial because, in the interval between selection of the jury and the trial, "ample time was available to conduct [an] investigation" of the jurors. But neither the decisions below nor any other decisions of which we are aware—and respondents cite none—support the surprising notion that an improper limitation on *voir dire* should be ignored because the petitioner might have been able to secure the desired information by hiring detectives to investigate each of the jurors. Indeed, such an investigation after a jury is selected would probably violate the Canons of Professional Ethics and might also constitute criminal contempt of court.[3]

Finally, respondents devote considerable attention to decisions standing for the general proposition that the trial judge has a large measure of discretion in conducting the *voir dire,* a principle also adverted to by the Court of Appeals in this case. Of course he does—in cutting off unduly prolonged interrogations,[4] in preventing abuse of jurors or improper efforts to influence the panel on the merits, and doubtless also in deciding many types of challenge for cause. See Pet. pp. 15-16. But, as other federal courts have recognized, the trial judge has no discretion to foreclose a line of inquiry that is material to the intelligent exercise of peremptory challenges, for otherwise the right of peremptory challenge would be undercut by the discretionary power of the court.

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[3] Canon 23 provides, *inter alia,* that "both before and during the trial [a lawyer] should avoid communicating with [jurors,] even as to matters foreign to the cause." And in *Sinclair* v. *United States,* 279 U.S. 749, this Court affirmed a contempt conviction based in large part upon the fact that the defendant had had the jurors placed under surveillance.

[4] As the complete transcript of the *voir dire* demonstrates, the proceeding was not at all lengthy in this case.

Conclusion

For the reasons set forth above, we submit that the arguments set forth in the petition for certiorari have not been undermined by the brief in opposition, and that *certiorari* should be granted.

Respectfully submitted,

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